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IN THE

Supreme Court of the United States

Term, 1976

No. 75-1368

VICTOR ACOSTA, JOSEPH BEDAMI, JR.,
and ANTHONY CRAPERO,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LAW OFFICES OF HENRY GONZALEZ
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Tampa, Florida 33602

HENRY GONZALEZ
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JAMES R. YON

Attorneys for Petitioners

March 23, 1976

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BLEED THROUGH

IN THE

Supreme Court of the United States

Term, 1976

No._____

VICTOR ACOSTA, JOSEPH BEDAMI, JR.,
and ANTHONY CRAPERO,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners as named above respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 29, 1976. Petition for Rehearing was timely filed and was denied by the Fifth Circuit on February 23, 1976. A certified copy of the judgment of the Fifth Circuit issued as and for the mandate as to the above named Petitioners was filed on March 3, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix I hereto. The opinion rendered by the United States District Court for the Southern District of Florida is reported at 386 F.Supp. 1072 and appears as Appendix II hereto.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC Section 1245(1) and 28 USC, Supreme Court Rules, Rule 19 1(b).

QUESTIONS PRESENTED

I. Whether the District Court had the power to dismiss the prosecution in this cause after the jury had announced its verdict of guilty.

II. Whether the conduct of governmental officials deprived Petitioners of due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment V.

". . . nor be deprived of life, liberty or property without due process of law . . ."

Amendment VI.

". . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

The Petitioners were indicted in the United States District Court for the Southern District of Florida in a one count indictment charging conspiracy to import controlled substance in violation of 21 USC Sections 812, 952 and 963. After commencement of trial three co-defendants were dismissed, the jury acquitted two other co-defendants, and convicted Petitioners as well as one other co-defendant. During the course of trial and at various stages therein Petitioners filed motions for dismissal on the grounds of governmental impropriety and in not complying with previous Court orders relative to

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discovery and other misconduct during the trial. The District Court took the various motions under advisement including the time subsequent to which the jury had returned its verdicts. The District Court thereafter entered an Order granting motions for dismissal.

The Government appealed the Order of Dismissal to the United States Court of Appeals for the Fifth Circuit whereupon the Order of Dismissal was reversed. Petitioners timely filed Petition for Rehearing which was denied and the judgment of the Fifth Circuit in mandate predicated thereon was issued to the District Court on March 3, 1976

A full and complete account of the factual matters upon which the District Court relied as a basis for entering its Order of Dismissal is revealed in the opinion of the District Court as duplicated herein.

Petitioners herein seek review of the reversal of the District Court by the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

> The decision of the Court of Appeals erroneously fails to decide an important question of Federal law which has not been but should be settled by this Court, and said decision is in conflict with the decision of another Court of Appeals on the same matter.

The thrust of the Government's appeal was centered upon the question of whether the District Court had the power to dismiss the indictment after jury verdict. Petitioners assert that sufficient legal authorities and factual circumstances were presented to the Court in order that it could rule on the central issue presented in the Government's appeal and further that said ruling should justifiably have been in favor of Petitioners.

In an unnecessary and uninvited exercise of forbearance the Court of Appeals sidestepped the fundamental issue presented in the Government's appeal but rather ruled that on the facts the District Court erred in dismissing the indictment on the grounds of governmental misconduct.

As to the first point, Petitioners feel that an important issue of Federal Appellate Law to-wit: the authority of a District Court to dismiss an indictment after a jury verdict of conviction ought to be decided in this forum. Secondly, Petitioners contend that the decision of the Court of Appeals on the facts and law in the instant case is in conflict with the decision of another Court of Appeals on the same matter.

A. Dismissal After Jury Verdict of Conviction

Notwithstanding the clear mandate of Rule 57(b), Federal Rules of Criminal Procedure, which authorizes the District Court to enter such orders as it may deem just and proper "so long as the Court proceeds in a lawful manner not inconsistent with these rules or with any applicable statute", the Government contended that the District Court had no legal authority to take its action citing the following cases: *Gray v. U.S.*, 174 F.2d 919, 924 (8th Cir. 1949), *cert. den.*, 338 U.S. 848; *United States v. Dooling*, 406 F.2d 192 (2nd Cir., 1969), *cert den., sub. nom.; Persico v. United States*, 395 U.S. 911; *United States v. Whitted*, 454 F.2d 642 (8th Cir., 1972).

Petitioners before the Court of Appeals presented argument and authority to the contrary. See *U.S. v. Apex Distributing Co.*, 270 F.2d 747, 756 (9th Cir., 1959); *O'Neal v. U.S.*, 272 F.2d 412, 413-414 (5th Cir. 1959); *U.S. v. Heath*, 260 F.2d 623, 632 (9th Cir., 1958); *U.S. v. Kane*, 243 F.Supp. 746, 752 (S.D.N.Y. 1965).

Insofar as a legal question was properly put before the Court of Appeals and is an important issue of Federal Appellate Law this Court should be compelled to grant the writ for the

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purpose of deciding the question presented, or at the very least, to remand the cause to the Court of Appeals for consideration thereof.

B. The Reversal on Facts

As mentioned hereinabove, the Order of Dismissal of the District Court clearly sets out the facts upon which the trial Court's Order of Dismissal was predicated. The opinion of the Court of Appeals says merely that such facts are not sufficient.

A clear showing of conflict based on almost parallel factual and legal considerations is shown in the opinion of United States Court of Appeals for the Eighth Circuit in *U.S. v. Banks*, 513 F.2d 389 (8th Cir., 1975). The *Banks* opinion was a dismissal of the Government's appeal of a District Court Order dismissing the indictment in the famed "Wounded Knee" case. See *U.S. v. Banks*, 383 F. Supp. 389 (W.D.S.D. 1974). The upholding by the Eighth Circuit of the District Court's dismissal in *Banks* was well founded upon this Court's fundamental opinions of *McNabb v. U.S.*, 318 U.S. 332 (1943) and *U.S. v Russell*, 411 U.S. 423 (1973).

The obvious parallel in facts cannot be ignored. The same law was considered by both the Eighth Circuit in the *Banks* case and the Fifth Circuit in the decision in this case below. The writ should issue to resolve the conflict.

CONCLUSION

The Fifth Circuit through its forbearance of consideration of the basic issue presented in the Government's appeal, that is to say the authority of the District Court to dismiss after jury verdict, should be reviewed by this Court. The reversal upon the facts is in clear conflict with the opinion of another Court of Appeals, said latter opinion being grounded upon authority supplied by this Court, and the writ should be issued for resolution of the conflict.

For these reasons Petitioners respectfully ask that the Writ of Certiorari issue.

Respectfully submitted,

LAW OFFICES OF HENRY GONZALEZ
620 Madison Building
Tampa, Florida 33602
Attorneys for Petitioners

By: _____
JAMES R. YON

PROOF OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition For Writ of Certiorari have been served upon the United States Solicitor General, Department of Justice, Washington, D. C. 20530 and upon the office of the United States Attorney for the Southern District of Florida, United States Post Office and Courthouse, Miami, Florida, by air express this 24th day of March, 1976.

LAW OFFICES OF HENRY GONZALEZ

By: _____
James R. Yon

UNITED STATES of America, Plaintiff-Appellant,

v.

Victor ACOSTA, Louis Llerandi, Joseph Bedami, Jr., and Anthony Crapero, Defendants-Appellees.

No. 75-1301.

United States Court of Appeals, Fifth Circuit.

Jan. 29, 1976.

After the return of verdicts convicting defendants of conspiracy to import controlled substances into the United States, the United States District Court for the Southern District of Florida, at Miami, Peter T. Fay, J., 386 F.Supp. 1072, granted motion dismissing the indictment because of prosecutorial misconduct and the Government appealed. The Court of Appeals, Coleman, Circuit Judge, held that where the relationship between Government and the paid informer, who was the star witness at trial, as well as informer's prior criminal record and other matters were all brought out on cross-examination in trial in which the credibility of the informer was the main issue, jury had all the facts before rendering a verdict and it was inappropriate to dismiss indictment because of charged prosecutorial conduct.

Reversed and remanded, with directions.

1. Criminal Law ⇐1165(1)

Defendants are entitled to take advantage of any error which prejudices their case but they are not entitled to reward for such conduct unless it could have had at least some impact on the verdict and thus redounded to their prejudice.

2. Criminal Law ⇐706(1)
Indictment and Information ⇐144.1(1)

Notwithstanding claim of improper prosecutorial conduct regarding Government's star witness, a paid informer whose credibility was essential issue in prosecution of defendant for conspiracy to import controlled substances into the United States, where all the facts regarding connection between such informer and Government, his prior criminal record and other matters were brought out on his cross-examination so that jury had all the essential facts before it when it returned verdict of guilty, trial court's dismissal of the indictment for prosecutorial misconduct was inappropriate. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1002, 21 U.S.C.A. § 952.

Appeal from the United States District Court for the Southern District of Florida.

Before COLEMAN, CLARK and INGRAHAM, Circuit Judges.

COLEMAN, Circuit Judge.

A jury convicted Victor Acosta, Louis Llerandi, Joseph Bedami, Jr., and Anthony Crapero of conspiracy to import controlled substances into the United States, 21 U.S.C. § 952. After the verdict was returned, the District Court dismissed the indictment for prosecutorial misconduct, *United States v. Acosta*, 386 F.Supp. 1072 (S.D.Fla., 1974). Judge Fay was of the opinion that the conduct in question was so outrageous that due process principles absolutely barred the

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prosecution from invoking judicial processes to obtain a conviction. The government appeals, seeking reinstatement of the verdict.

The government contends that district courts have no authority to dismiss an indictment after a guilty verdict has been returned; but assuming such authority *arguendo* it further contends that dismissal was inappropriate here. We find it unnecessary to reach or decide the first point but we do agree that this dismissal was inappropriate.

FACTS

The importation conspiracy of which appellees were convicted began on or about December 1, 1972, for the purpose of importing cocaine and marijuana from Colombia into the United States.

The star witness for the prosecution, an oft convicted felon named Rudy Limauro, was a paid informer who had played the role of a co-conspirator. At the trial the defense adduced virtually no evidence bearing upon the intrinsic merits of the case. Rather, the strategy was to discredit Limauro, coupled with the delivery of a withering attack upon the investigative and prosecutorial methods utilized by the government. This approach developed the following:

In November of 1972 Limauro had been convicted before Judge Fay of an unrelated crime. He was ordered to report in December for incarceration.

In the interim, Limauro gained favor with the authorities by disclosing the whereabouts of the perpetrator of a recent robbery-murder. At the request of federal agents and because of this cooperation, Judge Fay modified the sentence previously imposed on Limauro, placing him on three years probation.

Thereafter, Limauro began working as an informer for the federal Drug Enforcement Administration. This was done without probationary clearance for that activity, which did not come until March, 1973.

Based on the information compiled from Limauro, appellees and five others were indicted in June, 1974, for the drug conspiracy involved in this appeal.

Following indictment, appellees filed motions to compel disclosure of any promises of immunity and any preferential treatment to prosecution witnesses. In response, the government disclosed the following considerations accorded Limauro: (1) the aforementioned probationary sentence, (2) the pay Limauro received for his services, (3) a reward Limauro had received for another case he worked on, and (4) reimbursement for expenses he had incurred. The government denied any further promises of immunity, including a specific denial of any promises of favorable tax treatment.

Upon direct examination, while the government was putting on its case, Limauro testified that he had been given no promises from the prosecution except those above enumerated, plus the additional assurance that it would provide Limauro with a new identity following the trial. He admitted six prior felony convictions and swore that those were all the convictions he could recall.

On cross examination this testimony about the convictions was thoroughly exploded. Limauro was compelled to admit not six *but twenty* prior convictions, as well as several illegal activities for which he had not been convicted. He admitted violating probation while serving as an informer between December, 1972, and March, 1973; he admitted neglecting to report as income the $27,500 earned as an informer; he admitted using and distributing illegal drugs; and

he admitted that his knowledge of where the jewelry robber could be captured stemmed from complicity in the fugitive's escape.

Limauro testified that he continued to receive payment for information even after the indictment was returned, payments that had the appearance of being given in return for testimony, although Limauro denied this aspect of the matter.

Limauro further admitted that state charges had been lodged against him in Dade County, but no indictments had been returned. When asked whether he expected those charges to be dropped because of his testimony, he said he had no idea how they would be resolved. Later testimony by a state officer tended to refute this assertion. In fact, Limauro knew that following the trial the state officer intended to ask the state's attorney to drop the charges. Of course, Limauro did not know whether the state's attorney would comply, but he did have reason to believe the charges would be resolved favorably.

With regard to these Dade County charges, Limauro stood by his testimony in an earlier case to the effect that he did not then know of the charges. However, the defense produced a witness who, nine months prior to the earlier trial, had informed the Drug Enforcement Administration of the charges against Limauro. Therefore, the least damaging assumption is that in this case and the earlier trial the Drug Enforcement Administration allowed the government to let false prosecution testimony go unchallenged; the most damaging inference is that the Drug Enforcement Administration passed its information on to Limauro, and he perjured himself in the earlier trial and again in this case. Again, however, the jury in the instant case was made aware of the discrepancy.

Cross examination also disclosed Limauro had lied in his direct testimony regarding a meeting he had with appellee Acosta and his attorney.

The most damaging attack on Limauro's credibility concerned his role in the jewelry store robbery-murder. Despite the prosecution objection as to relevance, Judge Fay allowed lengthy cross examination about the robbery. Limauro testified that one of the perpetrators, Greer, approached him after the robbery, seeking help to escape. In response to the request, Limauro hid the jewels in his girl friend's home, discussed their value with a fence, and helped Greer escape in a camper. He did contact the police the night after the daytime robbery, a fact corroborated by the policeman to whom he reported. As a reward for Greer's capture, Limauro received $10,000.

When the defense called Greer as a witness he told a markedly different story. He testified that Limauro was more than the accessory after the fact; he accused Limauro of having planned the robbery, of having financially profited from it, and, in effect, of having betrayed Greer to gain a favorable reconsideration of his 1972 sentence.

On cross examination, Limauro reasserted three times that he had received no undisclosed promises of immunity. The trial court expressed incredulity at this testimony; aware of its obligation to reveal all such promises to the jury, the government agreed to a remedial instruction, which was read to the jury in the midst of the trial, as follows: "The Federal Government does not intend to prosecute Mr. Limauro for any illegal activity he testified to in his direct or cross examination."

In addition to the collateral assault on Limauro's credibility, and the related failures of the government to disclose promises to witnesses and to correct false testimony, three other governmental indiscretions were cited by the District Court as requiring dismissal.

First, defense witnesses testified that James Charles Gore, Jr., a state parolee, was used as an informer although Florida law prohibits it. To gain consent from Gore's parole officer, a federal agent had falsely asserted that permission had been obtained from his [the officer's] superiors.

Second, the government was slow in producing requested pay vouchers indicating moneys paid to an agent in South America. Copies of the vouchers did not arrive until the prosecution had completed its closing argument, too late for the defense to use them in cross examination. Nevertheless, the defense had already been apprised of the amounts of money involved, and they did not question the accuracy of those amounts.

Third, the government conspicuously dropped its prosecution against defendant Ronald Chandler after Limauro's testimony. The District Court surmised that Limauro had incriminated Chandler in his pre-trial information reports to the Drug Enforcement Administration but had deleted that evidence from his testimony. The correctness of the assumption was not verified, but the Court cited the prosecution for failing to disclose any discrepancies that might have led to a weaker case against Chandler.

During the government's case, at the close of the government's case, and at the conclusion of all testimony, the appellees moved for dismissal. Each time the Court reserved its ruling. After the verdict was returned, however, the Court granted the motions, relying on its supervisory power to order dismissal when "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction", *United States v. Russell*, 411 U.S. 423, 431, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973). *See also McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943).

THE DISTRICT COURT JUDGMENT

As to the more important aspects of it, Judge Fay's highly understandable judicial disapproval of tactics which he believed had occurred may be boiled down to the following:

1. [T]he prosecutor misrepresented the government's treatment of its principal witness, Rudy Limauro, and in so doing suppressed evidence. 386 F.Supp. at 1075.
2. Limauro's testimony on direct examination as to government promises to him was false and the government knew it was false but took no steps to amend or correct the answer. *Ibid.*
3. The government had access to documents from which it should have known that Limauro had been convicted of "more than twenty felonies", instead of six, but allowed his false testimony to stand. *Ibid.*
4. The prosecutors should have known of arrangements which must have been made for state immunity to Limauro and should have advised the Court in that regard. 386 F.Supp. at 1077.
5. Limauro had been given complete immunity, a blank check, by the government to participate as an accomplice in the jewelry store robbery and the murder of a policeman; nevertheless, the prosecu-

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> tion, knowing all this, continued to assure the Court that no promises of preferential treatment had been given Limauro. Under strict questioning by the Court, one of the prosecutors responded "Obviously no one was going to prosecute him. Obviously, no one was going to mention it. He was an important witness in a case involving narcotics." 386 F.Supp. at 1077.

Assuming that all this happened, the first concern is whether it was remedied in such a way as to eliminate any prejudice to the defendants' case. The significance of the jury being apprised of the facts before the case is submitted to it has twice been recognized by this Court, *United States v. Cawley*, 5 Cir. 1973, 481 F.2d 702; *United States v. Johnson*, 5 Cir. 1974, 487 F.2d 1318, *cert. denied*, 419 U.S. 825, 95 S.Ct. 41, 42 L.Ed.2d 48 (1974). *See also United States v. DeLeo*, 1 Cir. 1970, 422 F.2d 487, 498–99, *cert. denied*, 397 U.S. 1037, 90 S.Ct. 1355, 25 L.Ed.2d 648 (1970).

THE DISPOSITION HERE

[1] Taking them as they are recited in the opinion of the District Court, the tactics of government agents and prosecutors invited a swift and stern response. The question, however, is whether the response was correct. Carefully weighing the trial record, did the conduct require that the convictions be nullified? Should the action have been directed toward prosecutors and government agents rather than taking the form of a fortuitous escape for the convicted felons? Defendants are entitled to take advantage of any error which prejudices their case but they are not entitled to a reward for such conduct unless it could have had at least some impact on the verdict and thus redounded to their prejudice. See, *e. g.*, *United States v. Dooling*, 2 Cir., 1969, 406 F.2d 192, *cert. denied*, 395 U.S. 911, 89 S.Ct. 1744, 23 L.Ed.2d 224 (1969).

[2] The answer to these questions, as applicable to the case now before us, is to be found in the following considerations:

(1) Whatever the reluctance of the government to see its association with Limauro exposed, the exposure occurred; the jury heard the facts, developed by the skill and industry of defense counsel. This is not a case in which suppressed evidence failed to reach the jury. Assuming an effort at suppression, the effort signally failed. The defendants had the benefit of that failure, emphasized in blows which might have destroyed any hope of success. This was not a case in which false evidence, uncorrected, went to the jury.

(2) All of the evidence here in issue went directly to one subject, the credibility of a thoroughly blackened witness. It may be difficult to conceive of a person much worse than Limauro; yet the law did not bar him from the witness stand. The law left his credibility to the jury as the sole judge of it. Despite what it heard, the jury saw fit to convict.

(3) There was no plea of entrapment in this case. It was not contended that the black sheep led the others into the crime. The ultimate essence of their complaint is that they were brought to the penalties of the law by the testimony of one wholly unworthy of belief, that the government sought this result by unsuccessfully attempting to conceal the kind of character he really was. But the jury learned all about what kind of record he had, the uses to which the government had put him, and what he was getting out of it. Indeed, the jury was specifically told that the govern-

ment had no intention of prosecuting him, a sweeping reward, a thrust into the vitals of his credibility.

(4) The appeal is not before us on the merits. That will no doubt follow the imposition of sentence, but appellees have not suggested here that the evidence was insufficient to support a conviction.

All of this leads to the conclusion that the tactics in issue had no prejudicial influence on the outcome of the case. If anything, those tactics, fully exposed to the jury, should have redounded to the benefit of the defense. The appellees have shown no reversible prejudice. On the contrary, they had the benefit of repeatedly catching the prosecution in highly embarrassing positions as to the credibility of its witness.

In sum, the case was fought out on *credibility* and, with all the essential facts before it, the jury decided that issue, however unfortunately for the defendants.

Hence, we need not indulge in dictum as to whether the law empowers a District Judge to dismiss an indictment, after a verdict of guilty, on account of governmental (prosecutorial) misconduct. We decline the government's invitation to do so and leave the point for the day when, and if, it arises in appropriate appellate form.

This opinion does not infer that District Courts may not deal appropriately with prosecutorial misconduct. They have ample power to do so. What we hold here is that the necessary facts came out, the defendants were not prejudiced by what took place and, therefore, due process does not require that they be given the "reward" of having the jury verdict set aside and the indictment dismissed.

Neither is this opinion to be construed as approving the practice of withholding disclosure with the purpose of disclosing it later or with the idea that it will "come out" later. We take this case as we find it and decide it accordingly.

The dismissal of the indictment is reversed. The case is remanded, with directions to reinstate the verdict.

Reversed and remanded, with directions.

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BLEED THROUGH

UNITED STATES of America, Plaintiff,

v.

Victor ACOSTA et al., Defendants.

No. 74-388-Cr-PF.

United States District Court, S. D. Florida.

Dec. 31, 1974.

Following return of jury verdict of guilty in prosecution of four defendants, the District Court, Fay, J., on defense motions to dismiss case on basis of government misconduct, held that Government's conduct in suppressing evidence and condoning false testimony relating to promises of immunity, leniency, and preferential treatment of informant as well as to cash payments to another witness was so outrageous that due process principles absolutely barred Government from invoking judicial processes to obtain convictions.

Motions to dismiss granted.

1. Criminal Law ⇐700

Prosecuting authority has an absolute obligation to diligently gather information relating to things of value or benefits afforded a witness being relied upon in prosecution and to inform defendant of all such information.

2. Constitutional Law ⇐268(5)

Failure of prosecuting authority to diligently gather all information relating to things of value or benefits afforded a witness being relied upon in prosecution and to inform defendant thereof strikes at the very heart of "due process."

3. Criminal Law ⇐394.2(1)

Courts in federal criminal cases have a duty to require fair and lawful conduct from federal agents in the furnishing of evidence of crime.

4. Constitutional Law ⇐268(5)

Government's conduct in suppressing evidence and condoning false testimony relating to promises of immunity, leniency, and preferential treatment of informant as well as to cash payments to another witness was so outrageous that due process principles absolutely barred Government from invoking judicial processes to obtain convictions.

Ronald W. Rose, Sp. Atty., U. S. Dept. of Justice, Miami Strike Force, Miami, Fla., for plaintiff.

Dixon, Shear, Brown & Stephenson, Bernard H. Dempsey, Jr., Orlando, Fla., for Victor Acosta; Pearson & Josefsberg, Miami, Fla., of counsel.

Gonzalez & Lazzara, Anthony F. Gonzalez, Tampa, Fla., for Louis Llerandi.

Henry Gonzalez, Tampa, Fla., for Joseph Bedami and Anthony Crapero.

ORDER OF DISMISSAL

FAY, District Judge.

I. INTRODUCTION

This cause was tried before a jury for six days commencing November 11, 1974. Prior to the close of the case, three defendants were acquitted by the Court. The jury, thereafter, acquitted two defendants and convicted the four remaining defendants, Victor Acosta, Louis Llerandi, Joseph Bedami and Anthony Crapero.

During the prosecution's case, at the close of the prosecution's case, and again at the close of the entire case, the defense moved the Court to dismiss the case on the basis of government misconduct. In each instance, the Court agreed that it was within its jurisdiction and power to dismiss the case on this basis pursuant to McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L. Ed. 819 (1943); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L. Ed.2d 366 (1973); Williamson v. United States, 311 F.2d 441 (5th Cir. 1962); United States v. Banks, 383 F.Supp. 389 (S.D.1974); and United States v. Mahoney, 355 F.Supp. 418 (E.D.La. 1973). In each instance the Court reserved ruling on the defense motion.

The jury's verdict of guilt leaves the issue squarely before this Court. The

issue presented is whether or not "the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction." United States v. Russell, 411 U.S. 423, 431, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366, 373 (1973). For purposes of this Order, the defendants are presumed guilty, and the only issue is whether the end, the defendants proven guilty, justifies the means, the prosecution's methods of investigating and prosecuting this case.

Because of the nature of these defense motions and the severity of the remedy sought, the Court deems it appropriate to discuss in some detail the factual circumstances upon which the motions and this Order are based.

II

On November 14, 1972, Rudy Limauro, the government's principal witness in the instant case, was adjudicated guilty of conspiracy and sentenced to nine months incarceration to be followed by three years probation. Rudy Limauro was ordered to report to the United States Marshal to commence his incarceration on December 2, 1972. On December 1, 1972, Rudy Limauro requested and received an extension for his reporting time to December 14, 1972. On December 14, 1972, the Strike Force advised the Court that Rudy Limauro, acting as a good citizen and at great personal risk, had led state officials to the perpetrators of a vicious November 18, 1972 jewelry store robbery that resulted in the death of a Hollywood policeman and the wounding of a security guard. Based on this "cooperation" and Rudy Limauro's promise to continue to obey the law, the Court acquiesced by the joint request of the Strike Force and counsel for Rudy Limauro to suspend Rudy Limauro's nine month jail sentence.

Thereafter Rudy Limauro began working for the prosecution on the case, sub judice, and other cases, although he was not formally permitted to do so until March 1973. Rudy Limauro's conduct and the prosecution's failure to disclose to the defense the facts regarding his conduct, are the gravamen of the defense motions.

III

After the June, 1974 indictment in this cause, the defendants filed various pre-trial motions, including a Motion to Compel Disclosure of Existence and Substance of Promises of Immunity, Leniency or Preferential Treatment. United States Magistrate Michael J. Osman granted this motion on August 19, 1974. Judge Osman's Standing Discovery Order also required full compliance with Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

By letter to all defense counsel, dated November 1, 1974 (DL-# 1 for identification), the prosecutor advised that:

"UNITED STATES DEPARTMENT OF JUSTICE

Washington, D. C. 20530

November 1, 1974
RWR: bfe

Anthony F. Gonzalez, Esq.
Gonzalez & Lazzara, P. A.
202 Governor
Tampa, Florida 33602

Re: U. S. v. Acosta, et al.
74-388-Cr-PF
Disclosure of Promises, etc. to Government Witnesses

Dear Mr. Gonzalez:

Pursuant to the Government's obligation under United States v. Giglio, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972) and the Magistrate's Order entered in the above-styled case, it is the purpose of this letter to inform all defendants, through their respective counsel, of the existence of promises of immunity, lenience or preferential treatment, if any.

Insofar as Government counsel has been able to determine from a review of pertinent files and discussions with rel-

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evant investigative agencies, no promises of immunity, leniency or preferential treatment have been made to any Government witness, with one exception. Said witness will be identified for counsel and defendants immediately prior to trial.

The extent of any promise made to this witness are [sic] as follows:

Said witness on a prior unrelated charge entered a guilty plea in exchange for the Government's recommendation of sentence. Following the entry of the guilty plea, said witness was placed on probation and at that time, began actively cooperating with Federal agencies to develop prosecutable offenses.

No witness involved in this case has been promised any rewards, leniency in sentencing (other than previously stated), immunity, formal or otherwise, nor have any other agreements or understandings been entered into which in the opinion of Government counsel, would constitute preferential treatment.

No promises have been made to any witness regarding the diminution in any manner of any Federal, state or local taxes.

In response to a request from defendant Acosta as to promises of assistance from any Congressional Committee, etc., Government counsel, as a representative of the Executive Branch of Government, has no knowledge of any such promises to any Government witness.

This information is being supplied to you prior to trial and prior to the time required by Giglio, in an effort to facilitate the time required for trial.

Sincerely,

/s/ Ronald W. Rose
RONALD W. ROSE
Special Attorney
U. S. Department of Justice

ADDRESS:

111 N.W. 5th Street
Miami, Florida 33128
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The Court has concluded, for reasons which will be discussed, infra, that the prosecutor misrepresented the Government's treatment of its principal witness, Rudy Limauro, and that by so doing, the Government suppressed evidence. The Court's concern with this misrepresentation and suppression of evidence, is heightened by the fact that on the first day of trial the Court specifically ordered the prosecution team, two Strike Force attorneys and a DEA Special Agent, to obtain information as to the existence of any arrangements between Rudy Limauro and any law enforcement agencies.

IV

Rudy Limauro testified on November 12 and 13, 1974. During direct examination, the prosecutor asked Rudy Limauro whether "the Government of the United States promised you anything for your testimony today?" Rudy Limauro replied in the negative. The prosecutor asked no additional questions in this area and took no steps to correct or amend Rudy Limauro's answer.

Although the Court is still uncertain of the full nature and extent of promises which have been made to Rudy Limauro, it is abundantly clear that Rudy Limauro's answer to the prosecutor's question was false; that the prosecution knew it was false; and that the prosecutor did not advise the Court and defense counsel of the falsity of the testimony.

V

Rudy Limauro has committed many crimes. During his direct testimony, the prosecutor elicited from Rudy Limauro an admission that he had been convicted of seven separate felonies. Cross examination, revealed that, in fact, Rudy Limauro had been convicted of more than twenty felonies.

The Government has access to documents which precisely state the nature of each offense for which Rudy Limauro was arrested and/or convicted. Whether Rudy Limauro was convicted for seven or twenty felonies is not critical to

this case. Critical, however, is that the Government permitted Rudy Limauro's incomplete, and, therefore, false answer on direct examination to stand.

VI

During cross examination, Rudy Limauro admitted that warrants were outstanding charging him with the commission of four separate state felonies. He denied any knowledge as to why he had not been arrested since December 5, 1973, when the state warrants were issued. He denied any knowledge as to how the charges would ultimately be resolved. Rudy Limauro was confronted with sworn testimony he had given on September 4 and September 16, 1974 in unrelated federal trials. In his prior testimony, Rudy Limauro had denied knowledge of the existence of any state warrants. He explained this earlier denial by now stating that he first became aware of the warrants for the four state felonies after he testified on September 16th. Here again, the prosecution made no effort to correct or modify Rudy Limauro's statements, later shown to be false, that he was unaware of the state charges until after September 16, 1974, and that he had no idea as to how these state charges might be ultimately resolved.

Noting that the warrants had been outstanding for eleven months, the Court expressed its concern over the truthfulness of Rudy Limauro's testimony:

> THE COURT: Does the United States Government know at this point what has been said to Mr. Limauro about the pending state charges?
>
> Have any representations been made to him that he is not going to be prosecuted?
>
> How has he avoided being arrested? I mean, is the State just being a nice guy and because you happen to know where he is, they are saying, 'We are not going to arrest him'?
>
> Obviously, somebody has talked to somebody.

MR. ROSE: Your Honor, Mr. Limauro is presently under the witness protection program. He is in the custody of the United States Marshal.

THE COURT: All right. The Marshals have an obligation to protect him. They cannot do that very well when he is in the Dade County Jail. What has been done?

MR. ROSE: As far as I am aware, there have been no promises made to Limauro.

THE COURT: No promises; but the United States Marshal has hidden him out from state officers and they have not let state officers get near him.

MR. ROSE: That's not the fact as I know it.

THE COURT: Why hasn't he been arrested?

MR. ROSE: Your Honor, I have no information.

THE COURT: Let us find out. I think that is an obligation of the United States Government to find out.

You do not have a right to secrete a witness and not tell the defendants or, at least, their lawyers, why certain things are being done. It is no secret.

There are charges out against the man and he has not been arrested. Somebody has said, 'Don't arrest him.'

If there has been some agreement made between the state and the United States Government, the defendants are entitled to know what the agreement is because it works to the witness' advantage.

MR. ROSE: Well, your Honor, maybe I am missing the point. I understood our obligation to be any promises that were made to the witness. If he is not aware of anything—I am not assuming there is anything. If there is some promise or some agreement to that effect and he does not know about it—

* * * * * *

THE COURT: What concerns me is what has the Federal Government done to aid or to foster the interests

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of the witness, because that, I think, they are obligated to tell you.

* * * * * *

THE COURT: As I say, I just cannot believe there has not been some arrangement worked out. It does not just happen.

* * * * * *

THE COURT: The record shows what we have done. I have called upon the Government to let you know what agreement there is. I am sure it is not going to go away. I am sure it is going to be a problem that is going to be with us until it is answered.

Two days later the problem was answered—but not by the prosecution. The answer came when the defense called Dade County Public Safety Department Officer Thomas Dazevedo.

Officer Dazevedo testified that during January, 1974, (some nine months before Rudy Limauro's September 1974 testimony) he found Rudy Limauro in the custody of the DEA and advised Rudy Limauro and DEA officers of the four outstanding warrants. Thereafter, on at least one occasion, Officer Dazevedo, DEA agents and Rudy Limauro discussed both the existence and disposition of the four state warrants. It was agreed that at some time after the trial of the case, sub judice, and at a time convenient to Rudy Limauro, DEA agents and Officer Dazevedo, Rudy Limauro would go to the State Attorney's Office, give a statement and Officer Dazevedo would state that he had no objection to the dismissal of the state charges. Any suggestion that Rudy Limauro's false testimony concerning the state warrants, or the Government's failure to reveal its falsity, was unintentional, is implausible in light of the fact that Officer Dazevedo was in Rudy Limauro's presence both at the DEA office three days before the commencement of this trial, and in court, during this trial on its second day.

Considering the repeated instances of false testimony being given by Rudy Limauro, the Court is not surprised that Rudy Limauro testified falsely regarding the existence and future disposition of the state warrants. However, the Court is shocked at the Government's silence and acquiescence in this false testimony. If not for the uncontroverted defense testimony of Officer Dazevedo, Rudy Limauro would have perpetrated another fraud upon this Court. The two prosecutors and DEA agent present at trial should have known of the state court agreement and should have advised this Court and the jury of the falsity of Rudy Limauro's testimony.

VII

On cross-examination of Rudy Limauro it was developed that he had personally participated in numerous criminal violations while in the employ of the Federal Government. Rudy Limauro did not file tax returns. He did not pay income tax on the $27,500 he received from the Government since early 1973. He personally used cocaine and delivered it to others for their use. He was an accomplice with one of the co-defendants in this case, Ronald Chandler, in a separate conspiracy involving marijuana. He filed false reports with his probation officer from December, 1972 until July, 1974, in that he did not report his travel nor his true sources of income and employment. He was an accomplice in a robbery of a jewelry store, murder of a police officer, and wounding of a security guard in November, 1972. (Greer and Gonzalez testimony). Rudy Limauro was apparently given "complete and total immunity", along with a blank check by representatives of the Government.

Although in possession of this evidence, the prosecutor continued to represent to the Court that no promises of preferential treatment had been made to Rudy Limauro. Not until the Court questioned the prosecution team at length did one of the prosecutors concede:

"Obviously, no one was going to prosecute him. Obviously, no one was

going to mention it. He was an important witness in a case involving narcotics."

"As to his admission on the stand that he used narcotics, the practicality of this situation is no one is going to come into court, an agent is not going to grab him off the stand and hustle him down to the magistrate and indict him and try a case against him for that."

THE COURT: You and I know that.

MR. STEINBERG: That's correct.

THE COURT: Don't you think the Government has an obligation to tell the defense counsel that that is a consideration that has been given him?

VIII

On May 4, 1973, the Federal Government paid Rudy Limauro $3,500 in advance for services rendered and to be rendered in this case. (Exh. DA–6) Rudy Limauro first denied that he was paid money in advance. The prosecutor never corrected Rudy Limauro, but it soon became evident that he was paid money in May for work to be done by him in this case during the next two months. Later Rudy Limauro acknowledged that he received the money in advance from the Government agents so that they could "get" the defendants. The money was not compensation to Rudy Limauro for what he had done and information he had gained, but rather it was to pay Rudy Limauro for meetings and conversations with the defendants which had not even occurred when the payment was made. It is also interesting to note that Rudy Limauro received this $3,500 advance payment simultaneously with, or immediately prior to, his development of the habit of regularly injecting cocaine into his body.

IX

The defendants in this case were indicted in June, 1974. The evidence indicates that the conspiracy ended in late 1973. Yet, on cross-examination of Rudy Limauro, it was developed that pay vouchers showed that Rudy Limauro was paid (in addition to being paid for his "services" in unrelated cases) approximately $150.00 per week through September, 1974 in connection with this case. After reviewing his vouchers and all of his personally dictated statements which bear the same case number, Rudy Limauro testified:

Q—Would you agree with me, though, based upon what you have just said, that it looks like you have been paid to testify?

5.1 A—That's what it looks like.

The Government made Limauro its ward. They literally "took him on to raise" with continued subsistence (above minimal standards), protective custody and a "license" to participate in all types of criminal activity with no fear of prosecution or punishment. Although bad enough, this was compounded by secrecy.

Again we are met with the Government's failure to disclose the facts concerning payments to Rudy Limauro to the Court and to defense counsel. The prosecutor, confronted with this failure, told the Court that the same DEA case number relates to other cases still under investigation. There is, however, no evidence to support this representation. To the contrary, the vouchers bear separate case numbers relating to separate cases for which Rudy Limauro received specific sums of money.

Under the terms of his probation, even as modified, Rudy Limauro was never authorized to violate the law. Yet the Federal Government permitted him to continually break the law. Never was this fact revealed to the Court during the period of probation. Never was it revealed to the Court by the prosecution during the trial. Never was it revealed to the defense.

The United States Probation Officer is a member of the Court's personnel. On December 14, 1972, Rudy Limauro was placed on supervised probation. This was a reward to Rudy Limauro for his alleged assistance to law enforcement agencies. It was done on the special re-

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quest of officers of this Court and agents of the Federal Government. However, Rudy Limauro was placed under the same stringent requirements that apply to every probationer. He was required to associate only with law-abiding people, and the like. It was not until March 13, 1973, that this Court authorized Rudy Limauro's cooperation with federal agencies.

Unknown to the Court until Rudy Limauro testified on cross-examination was the fact that Rudy Limauro had been associating with such people as Ronald Chandler (a convicted felon) and Raymond Sheer (another convicted felon and "fence") between December, 1972 and March, 1973. The Court was not advised of Rudy Limauro's travels outside the Southern District of Florida during this same period of time in violation of the restrictions of his probation. The Court and its personnel were misled by Rudy Limauro's false monthly reports during this period. The DEA was apparently aware of Rudy Limauro's use of cocaine from May to December 1973, the period of alleged intense activity of the conspiracy at issue. Agents of the Federal Government knew of these probation violations as they were occurring and knew at the time of the trial of this case, that they had occurred. They did not disclose these facts to the Court, nor to defense counsel.

X

At the conclusion of Rudy Limauro's direct testimony, the Government dropped its charge against Ronald Chandler as a defendant for lack of evidence. The Court must conclude that Rudy Limauro sufficiently implicated Chandler during private interviews with Federal agents prior to trial but that his testimony during the trial concerning Chandler suddenly fell short. This is the same Ronald Chandler with whom Rudy Limauro engaged in illegal narcotics activities while on probation in May, 1973. Rudy Limauro told the federal agents of these illegal narcotics activities. This information was never disclosed to the Court or defense counsel.

XI

Considerable testimony was received concerning a meeting between Bernard Dempsey, one of the defense attorneys, and Rudy Limauro at the Fontainebleau Hotel in December, 1973. Rudy Limauro testified on direct examination that his false sworn statement was given to defense counsel on the day they first met at the hotel, and that he had been coerced into giving his statement that day. He stated that he was afraid that he would not be permitted to leave the hotel unless he gave a statement. It was not until Rudy Limauro was questioned on cross-examination that the Court learned that, in fact, Rudy Limauro met defense counsel one day, departed the hotel on the guise of seeing his attorney, and conferred instead with a DEA agent. Rudy Limauro voluntarily returned the next day and gave a false statement to defense counsel.

The Court is not here concerned with the credibility of the witness or the weight to be given his testimony. Nor is the Court directly concerned with why the DEA permitted Rudy Limauro to return and give a false statement, as opposed to not returning at all. The evil apparent to the Court and which is addressed here, is the failure, once again, of the prosecution to come forth and advise the Court and jury that Rudy Limauro testified falsely on direct examination concerning this incident. The Court is aware of testimony that agents reported all contacts with Rudy Limauro. If Rudy Limauro's cross examination admissions are true, there existed or should have existed, a record of Rudy Limauro's contact with a DEA agent the night before Rudy Limauro returned to the hotel to give his statement. If no such record of a contact exists, then it is possible that Rudy Limauro lied about seeing a DEA agent in between the two Fountainebleau meetings. In either case, this information should have been brought to the attention of the Court and jury.

XII

Another matter which disturbs the Court is the deceit worked upon the State of Florida by an agent of the United States. James Gore, a State parolee in May, 1973 was contacted by one of the defendants asking Gore to assist him to import marijuana into the United States. Gore agreed to assist the defendant, but immediately contacted Special Agent Zisk of the U. S. Customs Service in Miami. Because Special Agent Zisk was aware of Gore's parole status, he contacted Gore's parole supervisor, Richard de Treville. Probation Officer de Treville cautioned Zisk that a State parolee could not be used for undercover work unless clearance was first obtained from the Florida Probation and Parole Commission. A few days later Zisk advised de Treville that the Commission had given its approval for Gore to work with Zisk.

Four months later Probation Officer de Treville learned from his supervisor that the Commission had never been requested nor had it ever consented to allow Gore to work with Zisk. When de Treville confronted Zisk with this information, Zisk acknowledged that he had not been completely truthful with de Treville.

The concern of the Court is that such conduct indicates an apparent philosophy that any means are justified which result in a criminal conviction.

XIII

Early in the case, the Court ordered the Government to produce the vouchers which stated the amount of money paid special employees and the purposes for which the money was paid. The Court was of the opinion that its order had been complied with. It had not.

On November 14, 1974, Lauro Parente was called by the Government to testify. Parente was introduced to the defendants as a pilot from South America. Actually he was working for the Government in an undercover capacity. On cross-examination, Parente denied that he received any money from the Government at any time except to cover his out-of-pocket expenses. However, two vouchers, dated in 1972 and 1973, indicated that he also received money in return for information and for services rendered. It was only then that the Court was advised that additional vouchers for Parente existed but had not been produced to the defense as ordered. A totally unacceptable excuse was offered for their non-production and the Court reminded the prosecution of its previous order. With the information in the custody of the DEA, the agency which investigated this case, it was not unreasonable to expect that it would be available in advance of trial.

Only after the prosecutor made his closing argument to the jury on November 18th, did the Government finally produce documentation evidencing additional payments to Parente by the Government for information and services rendered as well as for expenses. The witness had already been excused and all of the evidence had been received.

In accordance with this Court's orders prior to and during trial, the Government should have had all vouchers available at a time when they would have been useful to the defense.

CONCLUSION

The four defendants, Victor Acosta, Louis Llerandi, Joseph Bedami and Anthony Crapero are guilty of serious criminal activity. Each deserves to be punished. Only the most serious overriding principles prevent such action. This situation causes great concern to this Court.

If we have learned anything from events of recent years, it is that those in authority must abide by the law or our way of life will surely perish. The end does not justify the means!

All those in law enforcement face the gravest tests in these times of rising crime. Their dedication is not in question nor their motives. To fulfill their

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mission demands great imagination and the broadest variety of tools. Informers are necessary; immunity to a known criminal is often dictated by the alternative; payment of funds for expenses or even for "services rendered" have been approved but surely there do exist limits. Are we to "fight crime with crime?" Do we change the rules because it seems expedient? In the abstract answers are obvious; in the instant cases very difficult.

[1, 2] Whether payments constitute impermissible "contingent fees" might be factually debatable but no one contests the absolute obligation of the prosecuting authority to inform a defendant of "all things of value or benefit" afforded a witness being relied upon in the trial. While it may be difficult for the attorney handling the trial to gather all such information, he must pursue it with diligence. It is not a cursory matter. With limited discovery in criminal cases, defendants and their counsel must rely upon the authenticity, accuracy, completeness and fairness of information furnished by representatives of the Government pursuant to the Federal Rules of Criminal Procedure and case law pronouncements (i. e. Brady v. Maryland, et al.). Failure to meet these requirements strikes at the very heart of "due process". As the Government involvement with an informer increases, so does the responsibility to properly advise the Court and defense counsel of the "true circumstances" surrounding such a witness.

[3] It is "the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents in the furnishing of evidence of crimes" [U. S. v. Williamson, 311 F.2d 441, 444 (5th Cir. 1962)] and as Chief Judge Brown stated on page 445 of 311 F.2d:

> ". . . recognized as is the role of informer in the enforcement of criminal laws, there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular."

[4] The use of Rudy Limauro, under these circumstances, and the failure of the Government to reveal "even the tip of the iceberg" to defense counsel, coupled with a similar "race for full disclosure" as to payments made to witness Parente, is *just too much*. Most reluctantly this Court concludes that dismissal is essential to our treasured precepts of "due process". It is, therefore—

Ordered and adjudged that the Defendants' Motion for Judgments of Dismissal be, and are, hereby granted.

Done and ordered at Miami, Florida this 31st day of December, 1974.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1368

VICTOR ACOSTA, JOSEPH BEDAMI, JR., AND ANTHONY CRAPERO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-6) is reported at 526 F.2d 670. The opinion of the district court (Pet. App. A-7 to A-15) is reported at 386 F. Supp. 1072.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 1976. A petition for rehearing was denied on February 23, 1976. The petition for a writ of certiorari, filed on March 25, 1976, is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in reinstating a guilty verdict that had been overturned by the district court on the ground of prosecutorial misconduct.

2. Whether this Court should review an issue not reached by the court of appeals, and not necessary to the resolution of this case, involving the power of a district court in criminal cases to overturn a jury verdict of guilty on grounds other than jurisdiction or sufficiency of the evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy to import controlled substances unlawfully, in violation of 21 U.S.C. 952. Following the jury verdict, the district court dismissed the indictment on the ground of prosecutorial misconduct (Pet. App. A-7 to A-15). The court of appeals reversed (Pet. App. A-1 to A-6).

1. The evidence showed that co-defendant Louis Llerandi, Rudolph Limauro (a government informant), and petitioner Acosta met several times in early 1973 to plan the importation of narcotics from Colombia (Tr. 204-205).[1] Llerandi and Acosta instructed Limauro to secure the services of a pilot to fly the narcotics into the United States. Accordingly, Limauro introduced them to an undercover government agent, who thereafter flew to Colombia but failed to meet petitioners' representative, as planned (Tr. 255-257; 794-798).

Subsequently, all three petitioners met with Limauro and Lauro Parente, a Brazilian commercial pilot, who agreed to make the flight (Tr. 278, 282-288, 905-909). Petitioner Acosta then met with James Gore, a parolee and licensed pilot, who also was a government informant; Acosta told Gore that he had obtained the services of a Brazilian pilot who had access to an airplane sufficiently

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[1] "Tr." refers to the three-volume transcript of trial which has been lodged with the Clerk of this Court. Co-defendant Llerandi is presently a fugitive.

large for the journey and cargo; that on reentry into the United States there would be no further use of the Brazilian pilot; and that at that point Gore should take command of the aircraft and throw the Brazilian pilot out of the plane (Tr. 1022). Acosta gave Gore $5,000 to use as down payment for the aircraft (Tr. 1030). The contraband was never brought into the United States before the conspiracy terminated.

2. During trial, the defense several times moved to dismiss the case on the basis of specific instances of alleged prosecutorial misconduct. The court reserved ruling on the motions until the jury returned guilty verdicts against petitioners, whereupon the court dismissed the indictment because of the misconduct (Pet. App. A-7). Specifically, the court faulted the prosecution for eliciting from Limauro testimony that he had been convicted of only seven felonies whereas, on cross-examination, it was shown that he had been convicted of more than twenty felonies (Pet. App. A-9); failing to correct Limauro's statements, later shown by defense counsel to be false, that Limauro was unaware of certain state charges then pending against him (Pet. App. A-10), that the government had made no promises to him in exchange for his testimony (Pet. App. A-11), and that he had not been paid by the government in advance for his services as an informant (Pet. App. A-12); failing to inform the court and the defense of certain payments, shown by the defense to have been made to Limauro by the government after the alleged conspiracy had terminated (*ibid.*); and failing to furnish in a timely fashion vouchers to support other payments, shown by the defense to have been made to Parente by the government (Pet. App. A-14). The court also criticized government agents for falsely representing to Gore's parole officer that formal clearance had been obtained from the State to use Gore as an informant while he was on parole (Pet. App. A-14).

On appeal, the court of appeals reversed the dismissal of the indictment and remanded with instructions to reinstate the verdict, reasoning that the misconduct, while censurable, had not in fact prejudiced the outcome of the case and that therefore "due process does not require that [defendants] be given the 'reward' of having the jury verdict set aside and the indictment dismissed" (Pet. App. A-6).

ARGUMENT

1. The court of appeals correctly concluded that the district court had erred in dismissing the indictment after the jury verdict of guilty. Notwithstanding the alleged prosecutorial misconduct, the jury was fully apprised of all the above-mentioned factors that tended to cast doubt on the credibility of government witnesses. Indeed, the government's initial failure fully to disclose these factors, and their subsequent elicitation by the defense, was likely further to have damaged these witnesses' credibility. The jury nevertheless decided that petitioners were guilty as charged. As the court of appeals observed, "the tactics in issue had no prejudicial influence on the outcome of the case. If anything, those tactics, fully exposed to the jury, should have redounded to the benefit of the defense" (Pet. App. A-6). Since the alleged government misconduct could not have resulted in misleading the jury to petitioners' detriment, they were not in fact deprived of a fair trial, and the Due Process Clause does not require that they go unpunished for their crimes.

Petitioners nevertheless rely upon *United States* v. *Russell*, 411 U.S. 423, and *McNabb* v. *United States*, 318 U.S. 332, apparently for the proposition that if misconduct is sufficiently outrageous, due process principles should bar the government from invoking judicial process to obtain convictions. Neither case is apposite. In *McNabb*, of

course, the Court did not bar any prosecution, but rather held that a confession obtained during a period of unlawful detention should not be admitted in evidence. *Russell* was an entrapment case[2] in which the Court observed in dictum that there might be circumstances in which police conduct producing a criminal act by a defendant might be so outrageous as to bar trial for that act. In the present case, petitioners' crime was not prompted by government misconduct. Thus, neither *McNabb* nor *Russell* is pertinent to a case of alleged misconduct at trial found not to have prejudiced the defendants. In short, petitioners cite no appellate authority that requires dismissal of an indictment under these circumstances, and we know of none.[3]

Finally, while we do not seek to justify the alleged misconduct, the district court has, as the court of appeals noted, ample power to deter prosecutorial misconduct without rewarding the defendant and penalizing the public by allowing guilty defendants to go free (Pet. App. A-6). Cf. *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976, plurality slip op. 6.

2. Petitioners also ask this Court to decide whether a district court has power to dismiss an indictment after a jury verdict on grounds other than sufficiency of the

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[2]There is no suggestion that any alleged government misconduct entrapped petitioners (Pet. App. A-5).

[3]*United States* v. *Banks*, 513 F.2d 1329 (C.A. 8), upon which petitioners also rely, is inapposite. In *Banks* a district court dismissed a prosecution before a jury verdict because of asserted prosecutorial misconduct. The court of appeals did not examine the substance of the government's appeal because it ruled that the order of dismissal was not appealable by the government in light of *United States* v. *Jenkins*, 420 U.S. 358. In petitioners' case, of course, the government's appeal was not barred by the Double Jeopardy Clause, because it resulted only in a reinstatement of the jury verdict and not in a new trial. See *United States* v. *Wilson*, 420 U.S. 332.

evidence or lack of jurisdiction. The government raised this question in the court of appeals, but the court declined to reach it because its disposition of the case made it unnecessary to do so (Pet. App. A-6). Neither the court of appeals in the instant case nor any other court has expressly passed on this question, and there is no reason why this Court should initially undertake to decide it in a case in which the resolution of the question does not affect the correct disposition of the case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
MERVYN HAMBURG,
Attorneys.

MAY 1976.

DOJ-1976-05